ORIGINAL

NO. 82397-9

IN THE SUPREME COURT OF WASHINGTON

CITY OF SHORELINE, a Municipal Agency; and DEPUTY MAYOR MAGGIE FIMIA, individually and in her official capacity,

Appellants,

v.

DOUG AND BETH O'NEILL, individuals,

Respondents

ANSWER TO WSAMA AND STATE OF WASHINGTON AMICUS BRIEFS

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I. INTRODUCTION

This brief is a joint Answer to the Amicus Briefs of the Washington State Association of Municipal Attorneys ("WSAMA") and the State of Washington ("State"), collectively "Government Amici".[1]

In their respective briefs, the Government Amici do not address Appellant Maggie Fimia's alteration and deletion of requested public records, the applicable retention schedule issues, or the premature dismissal of O'Neill's case by the trial court without a show cause hearing. Instead, amici address solely the issues related to an agency's duty to retain and produce metadata contained in electronic public records, and do so by arguing that this Court adopt a narrow interpretation of that duty, and also that this Court adopt a narrow interpretation of "public record" under the PRA.

The Government Amici's arguments and concerns need not be addressed in this case, and do not support the relief sought, even if considered by the Court.

[1] O'Neill does not disagree with the positions taken in the amicus briefs of the Washington Coalition for Open Government ("WCOG") or Allied Daily Newspapers of Washington and Washington Newspaper Publishers Association ("Newspapers"), and will not be answering those briefs.

II. ARGUMENT AND AUTHORITY

A. The Concerns Expressed by WSAMA and the State are Not Necessary to Resolve the Issues in This Case.

1. The sender and recipient lines of an email are undisputedly public records, whether considered metadata or not.

While the Government Amici argue in broad strokes about narrow definitions and tests for determining whether metadata in public records is itself a public record and should be disclosed, it cannot be disputed that the public records sought in this case—including the portion that has been characterized as metadata by Division I—are "public records" under the Public Records Act ("PRA") even under the tests argued by amici.[2]

Here, the intent of the people to encourage broad disclosure in enacting the PRA with an extraordinarily broad definition of "public record" is indisputable. This principle has been recognized repeatedly by this Court and the lower appellate courts. RCW 42.56.010(2) states "'Public record' includes any writing containing information relating to the conduct of government or the performance of any governmental or

[2] The State recognizes, in its "envelope" analogy, that "where the encoded electronic 'header' information has been retained and is specifically identified and requested, it may be subject to disclosure under the Act." State Amicus at 7. The State acknowledges, in arguing that most metadata is too attenuated from the actual substance of the email to be a "public record", that the header information of an email is indeed "viewable" by the email program, and is not "[f]or normal intents and purposes" separate from the email. Id. WSAMA also admits that "some portion of metadata associated with an email may relate to the conduct of government." WSAMA Amicus at 5. O'Neill agrees with the State that the header information is an intrinsic part of an email and is "part of the ordinary experience of a person using e-mail[.]" State Amicus at 7.

proprietary function prepared, owned, used, or retained by any state or local agency **regardless of physical form or characteristics."** (emphasis added). The email here is clearly a public record as it is a writing, contains information related to the conduct of government or performance of a governmental or proprietary function, and it is owned, was used, and was at the time retained by the government.[3]

Further, the embedded data reflecting who sent and who received such email further is a writing, contains information relating the conduct of government, and also is owned, and was at the time retained, by the government. Thus everything at issue in this case meets the definition and tests the Government Amici suggest and falls within the scope of Washington's definition of "public record", even if the Court determines that the metadata of a public record is separately subject to the "public record" analysis. **See also** O'Neill Supp. Brief at 16-22.

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[3] When a court is interpreting a statute, its first duty is to ascertain its plain language. **See Homestreet, Inc. v. State**, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (citation omitted). Additionally, when the language within statutes is plain and unambiguous, it must be presumed that the language within them reflects the intent of the Legislature. **See Wash. State Dept. of Ecology v. Campbell & Gwinn, L.L.C.**, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (citation omitted). Finally, "[t]he 'plain meaning' rule includes not only the ordinary meaning of the words, but the underlying legislative purposes and closely related statutes to determine the proper meaning of the statute." **Wash. Public Ports Ass'n v. Wash. State Dept. of Revenue**, 148 Wn.2d 637, 645, 62 P.3d 462 (2003) (citation omitted). These canons of statutory construction apply to PRA cases. **See, e.g., Limstrom v. Ladenburg**, 136 Wn.2d 595, 606, 963 P.2d 869 (1998) ("In determining the meaning of the statutory exemption at issue, we apply general principles of statutory construction."); **West v. Thurston County**, 144 Wn. App. 573, 583, 183 P.3d 346 (2008) (citing general rules of statutory construction in concluding statutory amendment applied retroactively).

The concerns raised by the State as to what type of "metadata" should fall within the definition of "public record" need not be addressed by this Court because, here, there can be no real dispute that the data sought by O'Neill is a public record.

2. O'Neill has never received the public records she requested.

No one disputes that O'Neill has never received the complete email that she requested, with full header information for the email intact. See City Supp. Brief at 3, 6-8. Instead, the heart of the City's argument is that by providing close approximations of the email actually requested, it has somehow complied with the PRA. See id.[4] O'Neill still has not received the original version of the email showing that Maggie Fimia was a blind-copied recipient of Lisa Thwing's message—the message that Fimia admits to altering before providing a paper print out to O'Neill, and then destroying "accidentally". CP 22.

Though all "blind carbon copied" recipients may not appear in an email, the blind-copied recipient does in fact appear in that recipient's version of the email. O'Neill has received a copy of the email from Lisa

[4] The City makes this argument, admitting it did not provide what was requested, when the PRA unambiguously requires nothing less than strict compliance. See Rental Housing Association v. City of Des Moines, 165 Wn.2d 525, 535, 539-41, 199 P.3d 393 (2009) ("RHA"); see also Hearst v. Hoppe., 93 Wn.2d 123, 139, 580 P.2d 246 (1978); Zink v. City of Mesa, 140 Wn. App. 328, 349, 166 P.3d 738 (2007). The City's Supplemental Brief in fact aids the Court by delineating at least three ways the metadata from the requested email and the metadata from the emails actually provided differ. See City Supp. Brief at 15-16.

Thwing sent to Janet Way, with the attendant metadata showing Way as a blind copied recipient, and also a re-sent version of the email from Lisa Thwing to Fimia. While metadata from the original email sent to Fimia would not show other bcc'd recipients, it would show Fimia as a bcc recipient. CP 24-25 (Decl. of City's IS Manager explaining that a printout sent to Ms. Fimia's email via bcc shows her as a recipient in the metadata). That O'Neill has not received the public record she requested thus cannot be reasonably disputed by the City, Fimia, nor amici.[5]

3. The email was not properly deleted, and the Government Amici do not argue it was.

Neither WSAMA nor the State argues that this email was deleted in accordance with retention schedules, as the City has repeatedly asserted. This is wise, since the City's argument is erroneous and the retention issue

[5] The State's citation to Hangartner to support the notion that the PRA does not authorize "unbridled" searches of agency records is misplaced. See State Amicus at 13. The language regarding prohibition of "unbridled searches of an agency's property" was used to support the premise that "a government agency need not comply with an overbroad request." Hangartner v. City of Seattle, 151 Wn.2d 439, 448, 90 P.3d 26 (2004). This is no longer an accurate statement of the law, as is recognized in a later portion of the State's Amicus. See State Amicus at 16. The Legislature amended RCW 42.56.080 in 2005, specifically adding language that overbreadth is not a basis to deny production of a record: "Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad." This statute was passed by the Legislature in direct response to that aspect of Hangartner. See Laws of 2005, ch. 487, § 1. See also WAC 44-14-04002(3); WAC 44-14-06002(5) (agency cannot claim public record exempt because the request is "overbroad"). O'Neill also notes that the only reason Division I believed that a search of Fimia's computer was necessary was because Fimia destroyed the requested record "accidentally" before it could be provided. The City has provided no credible argument that if the only manner in which an agency can actually comply with the PRA is to submit a computer that has been used to conduct public business to a forensic search—something routinely ordered by a court in the discovery context—that this is somehow an inappropriate extension of the PRA's extraordinarily broad mandate.

need not be addressed to resolve this case. Once the email was requested by O'Neill, it could not be considered a transitory electronic copy that should be deleted after being printed. City Resp. Brief at 18-19. The email could not be altered or deleted pursuant to any reasonable reading of the retention schedules at that time, and, as already argued by O'Neill (and now Amicus WCOG) the PRA specifically requires an agency to preserve requested records even if retention policies would allow the agency to destroy the records. RCW 42.56.100; **see also** O'Neill Supp. Brief at 4-5; WCOG Amicus at 8.[6] The City and Fimia cannot feasibly argue that they believed the request to be closed when O'Neill had been making repeated PRA requests for the same email within a very short period of time and O'Neill was obviously dissatisfied with the City's responses. **See** O'Neill Supp. Brief at 5 n.5. The State agrees that the header information

[6] The prohibition on an agency's destruction of a requested email is elaborated on in the Model Rules accompanying the PRA. According to the Model Rules:

> An agency is prohibited from destroying a public record, even if it is about to be lawfully destroyed under a retention schedule, if a public records request has been made for that record... The agency is required to retain the record until the record request has been resolved.

WAC 44-14-03005(1); **see also** MUNICIPAL RESEARCH AND SERVICES CENTER, Public Records Act for Washington Cities and Counties, Report Number 61 (November 2009) at 46-47. Moreover, if the agency "keeps a record longer than required—that is if the agency still possesses a record that it could have lawfully destroyed under a retention schedule—the record is still a 'public record' subject to disclosure." Attorney General's Office, **Open Government Internet Manual**, Chapter 1, § 1.4 (citing how the PRA includes writings "retained" by the agency in its definition of "public record"). If the record is scheduled for destruction pursuant to an agency retention schedule, but a request is then made for the record, the agency "must suspend its retention schedule for affected records until the public records request is resolved." **Id**.

connected to an email is generally considered part of an email, and that at least some metadata relates to the conduct of government. State Amicus at 5, 12-13. The State further acknowledges that if such metadata exists at the time of a request that it must be retained and cannot be destroyed. State Amicus at 7.

The parade of horribles described by the State and WSAMA regarding the potential agency production of all conceivable types of metadata associated with a public record need not be addressed or considered by the Court in the context of the current case because the record at issue here is a public record that has yet to be provided. The City and Fimia cannot shield themselves from liability by relying on hypothetical concerns when Fimia unlawfully altered portions of the email that cannot reasonably be considered outside the scope of what constitutes an email, as acknowledged by the State. Id. at 5 (an email "typically includes 'header' information, the text of the message, and any pictures, charts, or documents that were inserted in or attached to the e-mail.").

4. The request here was for an identifiable record.

The State makes the broad claim that a request for "metadata" is not a request for an identifiable record. See State Amicus at 11. Again, this case deals with a request for a specific email and its attendant metadata including, specifically, the embedded transmission information.

The City understood the request and what was sought, and provided metadata—just of different emails. O'Neill was increasingly specific in her requests to the City, and there can be no question that the City understood her, and that she requested identifiable records.

The Government Amici's arguments in favor of a narrowed definition for "public records" dealing with metadata or an exclusion of such records are justified neither by the facts nor the law. Agencies are armed with the ability and duty to request clarification of a request if they truly do not understand what is sought, and this should aid an agency in identifying the metadata in question in most circumstances. No authority has been provided for denying a request for metadata altogether as not identifying a record. As the Legislature has clearly indicated with its reversal by statute of this Court's holding in **Hangartner**, a requestor may request all records of an agency if he or she so chooses and it is not appropriate for an agency to deny such a request on the theory it does not identify any particular record.[7] So, too, a requestor can request all metadata regarding a particular document and such is a request for identifiable records. Again, the parade of horribles the Government Amici

[7] The final bill report for 2HSB 1758, which was incorporated into RCW 42.56.080, is available online at http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bill%20Reports/House%20Final/1758-S2.FBR.pdf. The final report specifically references the section of **Hangartner**'s ruling that was superseded by the passing of the bill into law. The full legislative history for the bill can also be found online at http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1758&year=2006#history.

argue overstate the potential burdens on agencies from such a rule as it ignores the tools already provided to agencies in the PRA for dealing with large or difficult requests, as discussed below.

B. Agencies already have a number of tools under the PRA for dealing with requests for metadata.

WSAMA and the State both express concerns regarding the scope of agencies' duties if Division I's ruling that metadata can be a public record is affirmed. However, amici neglect to mention that agencies already have a number of tools at their disposal to limit their potential liability and burdens under the PRA, while also providing timely access to requested public records.

First, agencies are specifically allowed by statute to ask a requestor for clarification of a request. RCW 42.56.520; WAC 44-14-04002(3); WAC 44-14-04003(7). Communication between the agency and requestor "is the key to a smooth public records process for both requestors and agencies." WAC 44-14-04003(3). This principle is encouraged to even a greater extent when the request involves electronic records that may present issues that paper records would not—such as the request at issue here. WAC 44-14-05003 ("When a request for electronic records involves technical issues, the best approach is for both parties to confer and cooperatively resolve them."). In keeping with the above principle,

agencies are allowed to ask a requestor to prioritize the agency's response to a records request "so that the agency is able to provide the most important records first." WAC 44-14-03006. If a requestor wants electronic copies of his or her requested records, some or all of which have embedded metadata, there is nothing preventing an agency from simply asking for confirmation that the requestor wants all of the records with their metadata or having the requestor state what metadata is desired.

Second, the PRA specifically allows an agency to provide responsive records in an installment basis. RCW 42.56.080; WAC 44-14-04004(3). Within the context of WSAMA's "worst-case scenario" argument regarding the production of metadata, the Model Rules state:

> Installments are useful for large requests when, for example, an agency can provide the first box of records as an installment. An agency has wide discretion to determine when providing records in installments is "applicable."

WAC 44-14-04004(3). Relevant here, if a request for electronic records with attendant metadata intact implicated a large volume of responsive records, the agency could provide the records on an installment basis.

Third, in terms of limiting the agency's potential liability under the PRA, the scope of a request for public records will dictate the reasonableness of the estimate of time required to respond to the request. See RCW 42.56.520. While the PRA requires that an agency provide the

"fullest assistance" and "most timely possible action", the "reasonable estimate" an agency may provide to a requestor is necessarily dependent on the size of the request or the number of records implicated in the response. RCW 42.56.100; **see also** WAC 44-14-04003(6) ("Some very large requests can legitimately take months or longer to fully provide. There is no standard amount of time for fulfilling a request so reasonable estimates should vary."). This fact-based determination also naturally factors such things as the relative size of the agency, its technical capability, and the amount of resources at its disposal. **See** WAC 44-14-05001(1). Agencies are also encouraged, again, to communicate with requestors if the original response estimate needs to be revised.

Lastly, RCW 42.56.100 provides that an agency "shall adopt and enforce reasonable rules and regulations...consonant with the intent of this chapter to provide full public access to public records...and to prevent excessive interference with other essential functions of the agency." **See also** WAC 44-14-04003(2). Under this principle, an agency is not required to respond to requests for records in a manner which would cause its functioning to grind to a halt, as warned of by WSAMA and the State.

If a request for electronic records and all of their attendant metadata truly encompassed thousands upon thousands of responsive records, and responding to the request—after the requestor confirmed that

he or she indeed wanted all the records—would necessarily cripple an agency's ability to perform its other tasks, it is already lawfully allowed to take extra time to respond, to respond in installments, or even abandon the outstanding request if the requestor fails to clarify an "unclear" request. RCW 42.56.520; WAC 44-14-04003(7). The internal safeguards already in place within the PRA thus addresses the hypothetical scenarios—even assuming such scenarios are grounded in reality—presented by WSAMA and the State.

Further, the storage and retention-related problems alleged by the Government Amici have similar remedies or solutions. First, agencies already have retention duties based on retention laws, and the State Archivist has formally adopted administrative rules pertaining to the maintenance of electronic records, found under WAC 434-662, which clarify how an agency may be relieved of the duty to permanently store its archive value records, including emails, and the content of such records to be saved. The rules specific to "E-mail management" state that emails "created and received" by an agency in the transaction of public business are public records and that archival value records must be retained—if the agency transmits the email "and all associated metadata" to the digital archives, the agency may be relieved of permanently retaining archival records. WAC 434-662-150; **see also** O'Neill Supp. Brief at 3.

The Government Amici's arguments that agencies will be clueless as to what to preserve and the attendant burdens from retention must be seriously questioned in light of agencies' duties, and ability, to transfer its electronic records and data to the State Archives relieving agencies of the obligation to store and retain the data themselves.

C. WSAMA and the State Conflate the Two Different Bodies of Law Concerning Metadata Within the Discovery and Public Records Contexts.

1. Discovery rule limitations cannot be imported into the PRA.

WSAMA and the State have apparently taken opposing views on how the discovery rules regarding metadata inform this case. WSAMA argues that the discovery rules regarding metadata are "instructive", specifically citing selected federal cases where the courts concluded that metadata was not discoverable because it was not relevant. See WSAMA Amicus at 5-6. WSAMA then attempts to conflate how the "immaterial" differences between documents, the same kind of differences recognized by courts in declining discovery, should somehow provide a "comparable limitation" on an agency's duty to respond to a PRA request. Id. at 6.

As opposed to WSAMA, the State warns that the substantial deviations between the rules for discovery and the PRA, such as the lack of a "good cause" standard in the PRA, the fact that a requestor need not even show that the records requested are relevant, the lack of sanctions for

not strictly complying in discovery, and other procedural and judicial aspects that help control the cost and burden of discovery not present in the PRA, precludes conflating the two areas. See State Amicus at 14-19.

O'Neill disagrees with the heart of both amicis' arguments. The Legislature has never shown a willingness to limit the PRA as discovery can be limited, thus WSAMA's proposal must be rejected. Further, the State misunderstands the point of the discovery case law, which illustrates the importance of metadata and the well-understood requirements at present to retain and preserve it in all its forms once a party is on notice it has any connection to a potential controversy.

WSAMA's argument fails primarily because the two areas of the law serve different principles, making any incorporation from one to the other unworkable.[8] Discovery is the process by which parties in an adversarial posture obtain information from one another; agencies, on the other hand, are custodians of the public's records. One area of law addresses the conduct of parties in litigation, and the other addresses the statutory duty of an agency to provide the public access to the public's records. This makes incorporation of the discovery rules into the PRA

[8] The normal civil rules, including those involving discovery, unquestionably apply to a PRA case absent a conflict with the statute. See Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 104-05, 117 P.3d 1117 (2005). The difference here is that WSAMA is attempting to apply the substantive limitations on parties within the discovery rules to limit the statutory duty of agencies to properly reply to a lawful PRA request outside of litigation.

context for determining what records should be provided inappropriate and legally groundless.

For instance, a trial court has broad discretion to control or limit the scope of discovery between litigants. **Nakata v. Blue Bird, Inc.**, 146 Wn. App. 267, 277, 191 P.3d 900 (2008) (citations omitted). In contrast, under the PRA, the trial court specifically cannot limit the scope of a PRA request and must also consider the broad public policy in favor of releasing non-exempt public records. RCW 42.56.550(3). The Court must also to liberally construe all PRA requests and disclosure provisions, while also narrowly construe exemptions from disclosure. RCW 42.56.030.

2. Case law shows that metadata can be invaluable and the selected cases cited by WSAMA related to the discoverability of metadata understate its importance.

Through a narrow selection of cases addressing the "relevancy" of metadata within the discovery context, WSAMA has presented a distorted view of how courts have assessed the value of metadata. See WSAMA Amicus at 5-6.[9] The role of metadata has dramatically changed over the

[9] WSAMA also implies, erroneously, that the standard is that only admissible discovery is relevant or that metadata lacks little evidentiary value at trial and therefore is not discoverable. This is not the legal test for relevance within the context for discovery. "The standard of relevance for purposes of discovery is much broader than the standard required under the evidence rules for admissibility at trial." **Beltran v. State Dept. of Social and Health Svcs**, 98 Wn. App. 245, 255, 989 P.2d 604 (1999) (citing **Barfield v. City of Seattle**, 100 Wn.2d 878, 886, 676 P.2d 438 (1984)). "The fact that the evidence

course of the past decade and has taken a significant, if not prominent, role in countless judicial actions in both the criminal and civil arenas. **See, e.g., State v. Garbaccio**, 151 Wn. App. 716, 723-29, 214 P.3d 168 (2009) (court affirms conviction of possession of child pornography based in part on existence of metadata identifying the pornographic nature of images no longer viewable on suspect's computer); **State v. Carroll**, 778 N.W.2d 1, 6, 17-18 (Wis. Feb. 3, 2010) (court reversing trial court's suppression of evidence, including metadata of an incriminating cell-phone photograph because warrant was valid); **Dawe v. Corrections USA**, __ F.R.D. __, 2009 WL 3233883 **4-5 (E.D. Cal. Oct. 1, 2009) (court ordering motion to compel inspection of metadata when there was evidence other party "forensically cleaned" their computer prior to initial inspection); **U.S. v. Brown**, 579 F.3d 672, 684 n.5 (6th Cir. 2009) (court noting that testifying experts indicated that metadata would help show when sexually explicit photos involving minors were taken); **U.S. v. Abu-Jihaad**, 600 F.Supp.2d 362, 369-70 (D. Conn. 2009) (metadata of document used to convict U.S. Signalman for disclosing national secret information to those not entitled to the information); **U.S. v. Graziano**, 558 F.Supp.2d 304, 314-15

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sought would be inadmissible at trial is not an impediment to discovery, so long as the information sought appears [to be] reasonably calculated to lead to the discovery of admissible evidence." **Beltran**, 98 Wn. App. at 255 (citation and internal quotations omitted).

(E.D.N.Y. 2008) (metadata part of the "significant amount of evidence" found in searching Internet browsing history in arson-related case).

Similarly, as the Newspaper Amici demonstrate, metadata is used by journalists and the general public to uncover injustice and illegal acts, to scrutinize government, and to test the veracity of statements made by the government and others. Newspaper Amicus at 10-11 & Appx.

The role of the trial court in a PRA context is thus much more constrained by operation of statute than it is in a regular civil action, and the idea that the general rules of discovery should be somehow intermixed and construed against the requestor has been soundly rejected by the relevant case law and is completely contrary to the PRA's policy, as is the suggestion that metadata's supposed lack of relevance has any bearing on how an agency must respond to a valid PRA request.

D. The Legislature Is the Only Body That Can Limit the Scope of the Public Records Act Definition of "Public Record."

The State makes a conflicting argument as to how to interpret the fact that "metadata" is not specifically listed in the "public record" definition within the PRA. On the one hand, the State acknowledges that some metadata can be a public record (despite not being specifically included in the definition). State Amicus at 14. On the other, the State argues that other forms of metadata cannot be considered a "public

record" and uses the failure of the Legislature to include reference to "this type of invisible metadata" as support. Id. at 13-14. In other words, one argument acknowledges that the definition of public record includes items not specifically mentioned, but the other presupposes that the same definition somehow requires further statements of Legislative intent to include the "invisible" metadata described by the State.

Besides the inherent lack of internal consistency, any limitation of the definition of "public record" must appropriately stem from the Legislature, and not from this Court. Because the definition of "public record" already encompasses metadata, as correctly recognized by Division I, the Legislature must specifically remove metadata from the scope of the PRA should it determine metadata can never be disclosable. It is absurd to argue that because the term "metadata" or its analogue is not explicitly found in the PRA somehow the PRA does apply to either separate public record metadata or the metadata of a public record, or that the Legislature needs to amend the statute to include "metadata", or that this Court is in a position to limit the scope of "public record."[10]

[10] On this point, WSAMA's attempt to differentiate Lake v. City of Phoenix, 222 Ariz. 547, 218 P.3d 1004 (2009) must be addressed. See WSAMA Amicus at 9-10. In Lake, the Arizona Supreme Court properly reversed the appellate court by ruling that "when a public entity maintains a public record in an electronic format, the electronic version of the record, including any embedded metadata, is subject to disclosure under our public records law." 218 P.3d at 1008. WSAMA argues Lake does not apply because there is no dispute here that some aspects of the metadata are public record that had to be provided. WSAMA Amicus at 10. However, the particular factual similarities or

As technology has evolved, the PRA has moved with it. It cannot be argued, for example, that emails of public officials are not public records. **See Mechling v. City of Monroe**, 152 Wn. App. 830, 222 P.3d 808, 814 (2009) (emails, including personal email addresses contained within emails, are subject to disclosure under PRA). But, when Initiative 276 was passed, and the PRA was drafted, the people and Legislature could not have been contemplating the inclusion of emails in the definition of public record. The definition was no doubt drafted in the broadest terms precisely to allow adaptation to new forms of records.

If the Legislature wishes to exclude a type of record that falls within the definition of public record, it must act to do so. "The Legislature is presumed to be aware of judicial interpretations of its enactments and that its failure to amend a statute following a judicial decision interpreting it indicates legislative acquiescence in that decision." **Soproni v. Polygon Apartment Partners**, 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999) (citations omitted). The Division I decision currently being appealed was decided on July 21, 2008. The appellate decision

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dissimilarities from this case is not why **Lake** is relevant. **Lake** is crucial because it provides, as the only other published case dealing with metadata as a public record, this Court with a reasoned approach for rejecting the notion that the metadata of a public record must separately meet the "public record" analysis under the PRA in order to be subject to the statute's disclosure provisions. **See Lake**, 218 P.3d at 1007 ("The metadata in an electronic document is part of the underlying document; it does not stand on its own. When a public officer uses a computer to make a public record, the metadata forms part of the document as much as the words on the page.").

clearly determined that metadata can fall within the purview of the PRA, and the Legislature has declined to pass any limiting language as to what does, or does not, constitute a "public record" under the PRA.

III. CONCLUSION

The alleged complexity of metadata within both the public record and general litigation arenas should not invite the Court to issue a ruling that would exempt public records from disclosure. The language of the PRA includes the records at issue here, and simply because metadata has implications beyond this case is not a justification to allow the withholding of records which are properly within the scope of the PRA. Therefore, it is not within the power of the Court to exclude an entire category of public records based on the fact that the category is evolving or may be inconvenient for agencies. Such a ruling would in fact be counter to earlier rulings by this Court. **See RHA**, 165 Wn.2d at 535 ("Administrative inconvenience or difficulty does not excuse strict compliance with the PRA.").

Respectfully submitted this 5th day of March, 2010.

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